

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	4:02CR3130
)	
v.)	
)	
MALINDA J. POLEY,)	ORDER
)	
Defendant.)	
_____)	

This matter is before the Court on defendant's motion for leave to proceed on appeal without prepayment of costs of fees (Filing No. 48). At the time of the filing of said motion, defendant also filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit (Filing No. 46). Defendant seeks to appeal *in forma pauperis* from the memorandum opinion (Filing No. 43) and order (Filing No. 44) of this Court entered on January 10, 2006. In that memorandum opinion and order, the Court denied defendant's motion filed pursuant to 28 U.S.C. § 2255 on the grounds that it was not timely filed.

Defendant's conviction and sentence became final on March 3, 2003, and her § 2255 motion was not filed until December 23, 2005. For those reasons, defendant's § 2255 motion was denied as time barred.

Title 28, United States Code, § 2253(c), provides that an appeal may not be taken from a final order in a proceeding under § 2255 unless this Court or a circuit justice issues a

certificate of appealability. Section 2253(c)(2) provides that a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. In reviewing defendant's § 2255 motion and this Court's memorandum opinion of January 10, 2006, the Court finds that defendant has not made a substantial showing of the denial of a constitutional right. For this reason, the Court will not issue a certificate of appealability.

Defendant has made an appropriate showing that she is entitled to proceed *in forma pauperis*. However, in view of the Court's decision that a certificate of appealability will not be issued in this matter, said application will be denied without prejudice. Accordingly,

IT IS ORDERED:

- 1) No certificate of appealability will issue.
- 2) Defendant's application to proceed on appeal *in forma pauperis* is denied without prejudice.

DATED this 8th day of May, 2006.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court